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Intrado Comm's Opposition to Motion to Dismiss and
Motion for Oral Argument

January 11, 2008

VIA OVERNIGHT DELIVERY

Mr. Joel H. Peck
Clerk
Virginia State Corporation Commission
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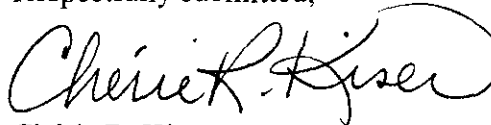
**Re: CASE No. PUC-2007-00112
Petition of Intrado Communications of Virginia Inc. for Arbitration
Pursuant to Section 252(b) of the Communications Act of 1934, as amended,
to Establish an Interconnection Agreement with Central Telephone
Company of Virginia and United Telephone - Southeast, Inc. (collectively,
"Embarq")**

Dear Mr. Peck:

Intrado Communications Inc. ("Intrado"), by its attorneys, hereby submits an original and fifteen (15) copies of its Opposition to Motion to Dismiss and Motion for Oral Argument in the above-referenced docket.

Please date stamp the additional copy of the Opposition and return it in the enclosed envelope. If you have any questions concerning this filing, please contact the undersigned.

Respectfully submitted,



Chérie R. Kiser

Counsel for Intrado Communications of Virginia Inc.

Enclosures

cc: Edward Phillips, Embarq
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Rebecca Ballesteros, Intrado

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

**Before the
COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

_____)
In the Matter of the Petition)
of Intrado Communications of Virginia Inc. for Arbitration)
Pursuant to Section 252(b) of the Communications Act)
of 1934, as amended, to Establish an Interconnection)
Agreement with Central Telephone Company of Virginia)
and United Telephone - Southeast, Inc.)
(collectively, "Embarq"))
_____)

CASE No. PUC-2007-00112

**OPPOSITION TO MOTION TO DISMISS
AND
MOTION FOR ORAL ARGUMENT**

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Dated: January 14, 2008

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**Before the
COMMONWEALTH OF VIRGINIA
PUBLIC UTILITIES COMMISSION**

In the Matter of the Petition)
of Intrado Communications of Virginia Inc. for Arbitration)
Pursuant to Section 252(b) of the Communications Act)
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and United Telephone - Southeast, Inc.)
(collectively, "Embarq"))

CASE No. PUC-2007-00112

OPPOSITION TO MOTION TO DISMISS AND MOTION FOR ORAL ARGUMENT

Intrado Communications of Virginia Inc. ("Intrado"), through its attorneys and pursuant to Rule 5-20-120 of the Virginia Administrative Code, hereby files this Opposition to the Motion to Dismiss ("Motion") filed by Central Telephone Company of Virginia and United Telephone-Southeast, Inc. (collectively, "Embarq") in which Embarq requests that the Virginia State Corporation Commission ("Commission") dismiss the Petition for Arbitration ("Petition") filed by Intrado in the above-captioned proceeding.^{1/} Intrado also respectfully requests that it be granted an opportunity to present oral argument on its Opposition to Embarq's Motion pursuant to Rule 5-20-210 of the Virginia Administrative Code.

As set forth herein, Embarq has failed to demonstrate as a matter of law why its Motion should be granted. Intrado is entitled to interconnection and arbitration under Sections 251 and 252 of the Communications Act of 1934, as amended ("Act") and Virginia law. The Commission should therefore deny Embarq's Motion.

^{1/} Under Rule 5-20-120, Intrado's response to Embarq's Motion is due within fourteen (14) days of the filing of the Motion. Embarq Motion was filed on December 21, 2007. Pursuant to Rule 5-20-140, when the period for filing is fifteen (15) days are fewer, intervening weekends or holidays are not counted in determining the due date. Thus, Intrado files its Opposition within fourteen (14) days (excluding weekends and holidays) of December 21, 2007, *i.e.*, January 14, 2008.

INTRODUCTION AND OVERVIEW

Under Virginia law, the standard for review of a motion to dismiss determines whether the factual allegations are sufficient to state a cause of action when accepting all material facts that are pled as true.^{2/} In the arguments presented, Embarq's Motion fails to demonstrate as a matter of law any basis for dismissing Intrado's Petition.

Embarq cannot have it both ways. During the Parties' five month negotiating period, Embarq entertained Intrado's Section 251(c) interconnection request, provided a template Section 251(c) interconnection agreement for negotiation purposes, acknowledged Intrado's proposed revisions to the interconnection agreement, and asked to extend the Section 252 arbitration deadline, but never fully raised the issue of whether Intrado was in fact eligible for interconnection under Section 251(c) until November 9, 2007. Once Embarq fully confirmed its position to Intrado on November 9, 2007, Intrado realized further "negotiations" without Commission involvement would likely prove to be futile. Intrado had no choice but to file for arbitration in order to secure its rights under the Act and Virginia law to obtain interconnection arrangements with Embarq that mutually benefit both Parties as co-carriers as well as their Virginia customers.

Intrado has fully complied with the requirements of the Act governing negotiation and arbitration of interconnection agreements. Embarq's claims that Intrado has not negotiated in good faith, that its Petition is procedurally deficient under federal and state law, and that Intrado is not entitled to Section 251(c) interconnection are merely a continuation of Embarq's efforts to shield from competition its entrenched monopoly over the provision of local exchange services in its Virginia service territory. Intrado cannot be held hostage to Embarq's unwillingness to

^{2/} *Parrish v. Affordable Dentures Dental Laboratories, Inc.*, 71 Va. Cir. 344 (2006).

effectively negotiate, which ultimately dictates the ability of Intrado to deploy its services in Virginia. Intrado is poised to offer competitive local exchange services in Virginia that include an alternative, IP-based technology that will “enable the public safety community to focus on future needs rather than requiring more from legacy systems, offer more redundancy and flexibility, and contribute greatly to improving compatibility between public safety systems that operate using different proprietary standards.”^{3/} Accordingly, Embarq’s Motion should be denied.

I. INTRADO’S PETITION COMPLIES WITH FEDERAL ARBITRATION REQUIREMENTS

Embarq’s attempt to evade its interconnection obligations by claiming Intrado’s Petition is deficient should be rejected.^{4/} Intrado’s conduct during its negotiations with Embarq and its Petition fully complied with the process envisioned by Congress as outlined in the Act. Intrado negotiated with Embarq in good faith, and when Embarq indicated it was unwilling to enter into a Section 251(c) interconnection agreement with Intrado, Intrado elected to exercise its right under the law to file for arbitration. There is nothing premature or flawed about Intrado’s Petition, and Intrado’s approach to the arbitration is precisely what Congress envisioned the process would be when it established the Act. Embarq is not prejudiced by the Petition or Intrado’s proposed interconnection agreement because Embarq has been given ample opportunity to respond to each of the issues raised by the Petition and did so on December 21, 2007. Accordingly, Embarq’s Motion should be rejected.

^{3/} *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶¶ 74-75, 80-82 (2007).

^{4/} Embarq Motion at 1-2.

A. The Section 251/252 Process Was Developed to Address the Uneven Bargaining Power between Incumbents and New Entrants

When Congress amended the Act in 1996 to open local exchange markets to competition,^{5/} it established the Section 251/252 negotiation and arbitration process. Recognizing that incumbent local exchange carriers (“ILECs”), such as Embarq, would have the incentive to thwart competition, Congress and the Federal Communications Commission (“FCC”) conferred upon competitive carriers not only a right to interconnect with the incumbent, but the right to do so on fair and pro-competitive terms. Interconnection regulations have thus been developed to compensate for the uneven bargaining power that exists between competitors and incumbents, such as Intrado and Embarq. Congress has established varying categories of rights and obligations for different types of carriers and made a deliberate decision in crafting Section 251 to impose certain requirements only on incumbent carriers in order to facilitate the entry of competitors.^{6/} The Act requires Embarq, as an ILEC, to negotiate in good faith the terms and conditions of interconnection agreements with competitive carriers to fulfill Embarq’s obligations under the Act.^{7/}

Section 252 of the Act provides additional benefits to competitors. Recognizing that commercial negotiations would be difficult because the new entrant would have “nothing that the

^{5/} Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.* (1996)).

^{6/} *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois before the Illinois Commerce Commission; et al.*, 13 FCC Rcd 1755, ¶ 3 (1997) (“*Low Tech Preemption Order*”), *recon. denied*, 14 FCC Rcd 7024 (1999). For example, “telecommunications carriers” are required to interconnect directly or indirectly under Section 251(a), 47 U.S.C. § 251(a), while only “local exchange carriers” are obligated to provide certain services under Section 251(b), 47 U.S.C. § 251(b). Similarly, Section 251(c) imposes additional obligations on “incumbent local exchange carriers.” 47 U.S.C. § 251(c).

^{7/} 47 U.S.C. § 251(c)(1). Those obligations include the duty: (1) to provide interconnection; (2) to make available access to unbundled network elements; (3) to offer retail services for resale at wholesale rates; and (4) to provide for the collocation of facilities. 47 U.S.C. §§ 251(c)(2)-(4), (6).

incumbent needs” and so “has little to offer the incumbent in a negotiation,”^{8/} Congress also established a procedure for arbitration of any disputes arising from the negotiations between the ILEC and the competitor.^{9/} The statutory framework was designed to protect competitive local exchange carriers from experiencing unreasonable delays in entering the marketplace formerly controlled exclusively by the incumbent.^{10/} Congress’s intent in providing for arbitration was to give competitors more leverage in the negotiation process.^{11/} Unlike commercial negotiations where both parties may have an incentive to reach agreement, ILECs have generally demonstrated a reluctance to abide by the law, and thus, arbitration is necessary to ensure that competitors without bargaining power have their rights protected. The language and design of Section 252 thus seeks to address the very unequal bargaining power manifest in negotiations between ILECs and competitors in order to advance Congress’s goal of increased competition.^{12/}

It is within this framework that Intrado requested interconnection negotiations and later filed its Petition with the Commission within the statutory window when it became clear that the Parties would be unable to reach a mutually beneficial negotiated agreement. Contrary to the

^{8/} *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 134 (1996) (“*Local Competition Order*”) (intervening history omitted), *aff’d by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

^{9/} 47 U.S.C. §§ 251, 252.

^{10/} *See Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, 2000 U.S. Dist. LEXIS 19649, 99-CV-4915 (ARR) (E.D. Va 2000) (noting that “[t]he tight schedule set out in the Act manifests an intention of Congress to resolve disputes expeditiously,” that the strict timelines contained in the Telecommunications Act indicate Congress’ desire to open up local exchange markets to competition without undue delay”) (quoting *AT&T Communications Sys. v. Pacific Bell*, 203 F.3d 1183, 1186 (9th Cir. 2000) and that “the legislative history explains that the purpose of the Act is ‘to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition’” (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996) reprinted in 1996 U.S.C.C.A.N. 10, 124)).

^{11/} *Local Competition Order* ¶ 15 (the “statute addresses this problem [of the ILEC’s “superior bargaining power”] by creating an arbitration proceeding in which the new entrant may assert certain rights”).

^{12/} *Local Competition Order* ¶ 15 (the “statute addresses this problem [of the incumbent’s “superior bargaining power”] by creating an arbitration proceeding in which the new entrant may assert certain rights”); *see also id.* ¶ 134 (noting that because it is the new entrant’s objective to obtain services and access to facilities from the incumbent and thus “has little to offer the incumbent in a negotiation,” the Act creates an arbitration process to equalize this bargaining power).

structure established by Congress, Embarq argues the Commission should support an interconnection approach that would give Embarq ultimate control over the negotiation process.^{13/} Intrado cannot offer service without interconnecting to the public switched telephone network (“PSTN”) and Embarq is one of the dominant gatekeepers to that network. If Intrado were required to wait until Embarq engaged in effective, constructive negotiations of an agreement that is beneficial to both Parties prior to filing for arbitration, Intrado’s rollout of competitive service offerings in Virginia likely would be delayed indefinitely. As discussed above, the Act was specifically designed to avoid the abuse of such power on the part of ILECs like Embarq and its Motion to Dismiss should be denied.

B. Intrado Has Acted in Good Faith as Required by the Act and the FCC’s Rules

The facts reflect that Intrado has acted in good faith to negotiate an interconnection agreement with Embarq.^{14/} Under the Act and the FCC’s rules, both parties to a negotiation are required to negotiate in good faith.^{15/} The FCC determined that some minimum requirements of good faith negotiation are needed “to address the balance of the incentives between the bargaining parties” in order to “realize Congress’s goal of enabling swift market entry by new competitors.”^{16/} The decision whether a party has acted in good faith is made largely on a case-by-case basis in light of all of the facts and circumstances underlying the negotiations.^{17/} A carrier violates its duty to negotiate in good faith by, for example, obstructing negotiations,^{18/}

^{13/} Embarq Motion at 4.

^{14/} Embarq Motion at 2.

^{15/} 47 U.S.C. § 251(c)(1); 47 C.F.R. § 51.301.

^{16/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 141.

^{17/} *Local Competition Order* ¶¶ 142, 150.

^{18/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 148.

delaying negotiations,^{19/} conditioning negotiations on a carrier first obtaining state certification,^{20/} refusing unreasonably to provide relevant information,^{21/} requesting that a competing carrier “attest that the agreement complies with all provisions of the 1996 Act, federal regulations, and state law,”^{22/} and by failing to comply with reasonable requests for cost data.^{23/}

Embarq has not demonstrated that Intrado engaged in such conduct. Rather, there is ample evidence indicating that Embarq has not acted in good faith by taking “actions that are deliberately intended to delay competitive entry, in contravention of the statute’s goals,” which the FCC has determined it “will not condone.”^{24/} The substance of Embarq’s Motion fails to support a claim of bad faith by Intrado.

First, Embarq wrongly claims that Intrado delayed the negotiation process after Embarq sent Intrado its “standard terms and conditions for CLEC interconnection.”^{25/} After receiving Embarq’s template agreement, Intrado contacted Embarq on numerous occasions to schedule a “meet and greet” call between the Parties prior to Intrado providing a mark-up of the Embarq template agreement.^{26/} Embarq’s “standard” agreement did not represent a logical starting place for Intrado. As a facilities-based carrier, Intrado requires specific network interconnection arrangements to achieve a cost-effective and efficient network that will allow Virginia consumers to reap the benefits of competition. Thus, Intrado sought to discuss its interconnection needs with Embarq first rather than provide a redlined agreement without the

^{19/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 149.

^{20/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 154.

^{21/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 149.

^{22/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 152.

^{23/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 155.

^{24/} *Local Competition Order* ¶ 154.

^{25/} Embarq Motion at 2, 4.

^{26/} Intrado Petition at 12.

underlying rationale as to why Intrado's proposed revisions were made. After numerous email exchanges, Embarq finally agreed to hold an initial call on September 18.^{27/} Within *three business days* after the call, Intrado provided its initial mark-up to Embarq reflecting the Parties' discussions on the call.^{28/} Embarq's "delay" claims are simply without merit.^{29/}

Second, Embarq attempts to condemn Intrado by claiming that Embarq acted in good faith by responding to the issues raised by Intrado in its mark-up of the template agreement.^{30/} This claim is untrue. Embarq's so-called "responses" to Intrado's proposed language are more appropriately characterized as delay tactics rather than responses: "We are still discussing internally" (October 3, 2007);^{31/} "We are working on a response to you" (October 24, 2007);^{32/} "your request for interconnection . . . [may not be] subject to the interconnection obligations of §251(c)(2) of the Act" (November 1, 2007).^{33/} These types of delay tactics do not demonstrate Embarq's good faith.^{34/}

Third, Intrado's inclusion of issues for the first time in its Petition does not represent a lack of good faith as suggested by Embarq.^{35/} As discussed above, such an approach is consistent with the framework established by the Act and Embarq has been given the opportunity to respond to Intrado's issues in its response to the Petition. Moreover, Intrado specifically

^{27/} Intrado Petition at 12.

^{28/} Intrado Petition at 12.

^{29/} *Cf. Local Competition Order* ¶ 149 (stating "parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information").

^{30/} Embarq Motion at 3-4.

^{31/} Attachment 7 to Intrado Petition (attached hereto as Attachment 1).

^{32/} Attachment 10 to Intrado Petition (attached hereto as Attachment 2).

^{33/} Attachment 11 to Intrado Petition (attached hereto as Attachment 3).

^{34/} *Cf. Local Competition Order* ¶ 148 (stating that "intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement").

^{35/} Embarq Motion at 3-4.

contacted Embarq *after the Petition was filed* to determine whether additional negotiations might be useful to reduce the number of issues for which Embarq would be required to respond.^{36/} As the Commission is well aware from prior arbitrations, it is fairly typical that as the arbitration process plays out, the parties will continue to negotiate and resolve issues, which is what Intrado has tried to do and will continue to do.^{37/} In response, however, Embarq refused to engage in additional negotiations unless Intrado withdrew its Petition or agreed to hold the arbitration proceeding in abeyance.^{38/} Thus, while Embarq argues that issues raised in Intrado's Petition could have been "voluntarily resolved,"^{39/} Embarq rejected Intrado's attempts to do just that. Embarq's refusal to participate in further negotiations with Intrado is a failure to negotiate in good faith as required by the Act.^{40/}

Further, inclusion of issues for the first time in a petition for arbitration is not unique to the instant arbitration. Carriers filing petitions for arbitration are required to identify all issues raised by the interconnection agreement to be arbitrated by the state commission, or lose their right to such arbitration.^{41/} As a practical matter, some issues are not put on the table during the negotiation process because they are less critical to the proposed interconnection arrangement or the negotiating parties simply do not have enough time to address them before the arbitration

^{36/} Email correspondence from Thomas Hicks, Intrado, to Various Intrado Personnel (Dec. 13, 2007) (indicating that a message had been left for Embarq regarding ongoing negotiations to reduce the outstanding issues raised in the arbitration filing) (attached hereto as Attachment 4).

^{37/} This approach is also consistent with the Act and the Commission's rules. 47 U.S.C. § 252(b)(5); 20 V.A.C. § 5-419-10 ("The filing of an arbitration request shall not preclude the parties from continuing negotiations on unresolved issues.").

^{38/} Email correspondence from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Dec. 14, 2007) (attached hereto as Attachment 5).

^{39/} Embarq Motion at 4.

^{40/} 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.").

^{41/} 47 U.S.C. § 252(b)(1).

deadline. In this case, however, many of the issues identified by Intrado in its Petition could have been discussed with Embarq prior to the filing of the Petition if Embarq had indicated it was willing to negotiate with Intrado or had otherwise responded to Intrado's initial mark-up. Under Embarq's approach, competitors like Intrado would be at the mercy of the ILEC to determine which issues should be identified and negotiated before an arbitration petition is filed.

In addition, the FCC utilizes a similar arbitration method when it assumes the jurisdiction of a state commission pursuant to Section 252(e)(5) of the Act.^{42/} Specifically, the FCC has embraced a "best final offer" process as the preferred method for arbitration of interconnection agreements.^{43/} Under this style of arbitration, also known as "baseball arbitration," each party presents to the arbitrator its preferred language to be implemented in the interconnection agreement and the arbitrator makes its ruling based on each party's proposals, hearings, and briefs in support. The FCC has recognized that final offer arbitration fosters a situation where "each party has incentives to propose an arrangement that the arbitrator could determine to be fair and equitable."^{44/} The FCC also has acknowledged that "parties are more likely to present terms and conditions that approximate the economically efficient outcome, because proposing extreme terms and conditions may result in an unfavorable finding by the arbitrator" under the final offer method.^{45/} Accordingly, there is no justification for Embarq's claim that Intrado acted in bad faith by submitting its proposed interconnection agreement language with its Petition.

^{42/} 47 U.S.C. § 252(e)(5). This section allows the FCC to step in the shoes of a state commission that has failed to act in response to a petition for arbitration.

^{43/} 47 C.F.R. § 51.807(d).

^{44/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 14172, ¶ 268 (1996) ("*Local Competition NPRM*").

^{45/} *Local Competition NPRM* ¶ 268. The FCC observed that open-ended arbitration is slower and more difficult to administer than final offer arbitration. See *Local Competition NPRM* ¶ 268.

C. Intrado's Petition Meets the Requirements of Section 252(b)

Intrado's Petition fully complies with the requirements of Section 252(b).^{46/} Intrado has set forth the issues presented by Embarq's template interconnection agreement and has explained its position on each issue in detail providing both the operational and legal justification for its proposed language changes. Intrado also provided the precise language needed in the interconnection agreement to effectuate the interconnection arrangement proposed by Intrado. Embarq's refusal to respond to Intrado's proposed revisions to the interconnection agreement language and its continued refusal to negotiate with Intrado made it impossible to describe Embarq's position in detail on each of the unresolved issues.^{47/} Embarq's argument is also disingenuous given that Embarq has been given the opportunity to set forth its own position on each of the issues in its own words and raise any additional issues it deems necessary as contemplated by the Act.^{48/} Intrado has complied with the requirements and purpose of Section 252(b) and the Commission's rules, which is to set forth the disputed issues that the Commission is called upon to resolve. Therefore, Embarq's procedural deficiency arguments should be rejected.^{49/}

^{46/} 47 U.S.C. § 252(b).

^{47/} Cf. Embarq Motion at 5.

^{48/} 47 U.S.C. § 252(b)(3).

^{49/} Embarq's claims that Intrado's Petition should be dismissed due to the lack of prefiled testimony should also be rejected. See Embarq Motion at n.3. The rule cited by Embarq requires the petitioner to "file any request for hearing along with any prefiled direct testimony and all materials it will rely on to support its case at hearing, including all evidence it intends to present." See 20 V.A.C. § 5-419-30(1). Based on Commission precedent and discussions with Commission staff prior to filing the Petition for Arbitration, Intrado understood that the Commission would likely decline to exercise jurisdiction over Intrado's arbitration request and defer the arbitration to the FCC. Thus, there was no expectation that there would be a hearing before the Commission on the substantive issues raised in Intrado's Petition and therefore no reason to file direct testimony or other hearing-related materials with the Commission at this time.

II. INTRADO'S INTERCONNECTION REQUEST IS GOVERNED BY SECTION 251 AND THUS ITS ARBITRATION PETITION IS PROPER UNDER SECTION 252

There is no merit to Embarq's claim that Intrado's Petition raises issues that are not subject to arbitration under the Act.^{50/} While Embarq may utilize commercial agreements and tariffs for services or arrangements it perceives to be similar to those sought by Intrado,^{51/} that does not preclude Intrado from exercising its rights to interconnect with Embarq pursuant to Section 251(c). The interconnection arrangements proposed by Intrado and the issues raised in its Petition are appropriately the subject of a Section 251(c) interconnection agreement and the Section 252(b) arbitration process. Any other approach would be contrary to law.

A. Intrado Offers Telephone Exchange Service and Exchange Access Service

As discussed in detail in Intrado's Petition, Intrado's service offerings constitute telephone exchange service and exchange access service.^{52/} Intrado and its affiliates hold authority to provide competitive local telecommunications services in thirty-seven states and have entered into numerous Section 251(c) interconnection agreements with other ILECs, such as Qwest and SBC (now known as AT&T). In 2000, claims similar to those raised by Embarq here were raised by AT&T (then SBC) in response to Intrado's (then known as SCC Communications) request for interconnection in California and Illinois. Both the California Public Utilities Commission and the Illinois Commerce Commission rejected AT&T's attempts to block competition with such claims and found Intrado was entitled to interconnection under Section 251(c) and arbitration under Section 252 because it was acting as a telecommunications

^{50/} Embarq Motion at 5-6.

^{51/} Embarq Motion at 6, 7.

^{52/} Intrado Petition at 20-24.

carrier and provided telephone exchange service, exchange access, and telecommunications services.^{53/} The law continues to support the Commission making a similar finding here.

Intrado seeks to offer local exchange services like any other competitor operating in Virginia. In addition, Intrado will offer 911 services to Public Safety Answering Points (“PSAPs”) located in Virginia similar to the product currently offered by Embarq in Virgin. Interestingly, Embarq’s Virginia tariff specifically states that Embarq’s basic 911 service is

a telephone exchange service, whereby a Public Safety Answering Point (PSAP) designated by the customer may receive and answer, transfer and dispatch in response to public emergency telephone calls. . . . The customer must subscribe for additional local exchange service at all termination points (of 911 calls) for administrative purposes for placing outgoing calls and for receiving other emergency calls, including any which might be relayed by Company operators.^{54/}

Likewise, Embarq’s Virginia tariff indicates that Embarq’s E911 service is

a telephone exchange network service which utilizes a computerized system to automatically route emergency telephone calls placed by dialing the digits “911” to the proper public safety answering point serving the jurisdiction from which the emergency telephone call was placed.^{55/}

Embarq cannot credibly argue that Intrado’s 911 service offering is not telephone exchange service when it classifies its own service as such. Indeed, the fact that Embarq’s 911 service is

^{53/} See generally Docket No. 00-0769, *Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.*, Arbitration Decision (I.C.C. Mar. 21, 2001) (“*Illinois Order*”); Decision No. 01-09-048, *Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.*, Opinion Affirming Final Arbitrator’s Report and Approving Interconnection Agreement (C.P.U.C. Sept. 20, 2001) (“*California Order*”).

^{54/} United Telephone - Southeast, Inc. Virginia, Tariff SCC No. 1., General Subscriber Services Tariff, Section U21, Original Page 1 (effective June 27, 2001) (emphasis added).

^{55/} United Telephone - Southeast, Inc. Virginia, Tariff SCC No. 1., General Subscriber Services Tariff, Section U21, Original Page 3 (effective June 27, 2001) (emphasis added).

included in Embarq's tariff is proof that Embarq views that service as a telecommunications service.

Further, the distinctions that Embarq seeks to make between the "voice network" and the "data or information network" portions of the wireline 911 network simply do not exist.^{56/} While Embarq recognizes that it is required to provide Intrado with access to 911 databases, Embarq attempts to separate 251(c) interconnection obligations from that requirement.^{57/} The wireline 911 network is interconnected to the PSTN.^{58/} Interconnection for transmission and routing of 911 traffic and access to 911 databases are functions that are so intertwined that one would be useless without the other.^{59/} Indeed, segmenting the physical routing of 911 calls from the database that provides the routing information for such calls as Embarq suggests^{60/} would significantly diminish the viability and reliability of 911 services.

The interconnection and trunking facilities that Intrado seeks for the provision of its local exchange services and its competitive 911 services are no different than the interconnection Embarq provides to other competitors in Virginia. Intrado is not asking for "unbundled access to the voice portion of the wireline E9-1-1 Network" as Embarq claims.^{61/} Rather, Intrado is merely seeking its rights, as recognized by the FCC, to "nondiscriminatory access to, and

^{56/} Embarq Motion at 6.

^{57/} Embarq Motion at 7-8.

^{58/} *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 14 (2005) ("*VoIP E911 Order*") (noting that the 911 network is interconnected with the public switched telephone network).

^{59/} *VoIP E911 Order* ¶ 15 (finding the Wireline 911 Network consists of the Selective Router, the trunk line(s) between the Selective Router and the PSAP, the ALI database, the SRDB, the trunk line(s) between the ALI database and the PSAP, and the MSAG).

^{60/} Embarq Motion at 6.

^{61/} Embarq Motion at 6.

interconnection with, [Embarq's] networks for the provision of 911 and E911 services^{62/} and other local exchange services to end users.

Embarq's claim that 911 interconnection is governed by Section 251(a)^{63/} is an inaccurate statement of the law. Specifically, the FCC decision cited by Embarq states:

the [FCC] currently requires [local exchange carriers] to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions. . . .^{64/}

Thus, contrary to Embarq's assertions, Embarq is required by Section 251(c) to make "interconnection to 911 facilities" available to Intrado to the same extent it would provide such interconnection to itself or any other competitor operating in Virginia.

B. The Items Included in Intrado's Proposed Interconnection Agreement Are within the Purview of Section 251(c)

Embarq wrongly claims that Intrado has "inappropriately" included items in its proposed interconnection agreement that are outside of Section 251(c).^{65/} Embarq, however, does not specify the items in Intrado's proposed interconnection agreement that it considers beyond the scope of Section 251(c). The interconnection arrangements and language requested by Intrado in its Petition were based on Embarq's template interconnection agreement provided to Intrado as the starting point for negotiations in response to Intrado's Section 251(c) negotiation request. In *Coserv*, the Fifth Circuit expressly held that

^{62/} *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Petition of City of Richardson, Texas*, 17 FCC Rcd 24282, ¶ 25 (2002).

^{63/} Embarq Motion at 6.

^{64/} *VoIP E911 Order* ¶ 38 (emphasis added).

^{65/} Embarq Motion at 7-8.

where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). . . . Congress knew that these non-251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by the [state commission].^{66/}

Notwithstanding Embarq's argument to the contrary, Intrado has not forced Embarq to arbitrate issues that were not included in the Parties' negotiation in contravention of *Coserv*.^{67/} Rather, each and every issue raised in Intrado's Petition flows from revisions to Embarq's own template 251(c) interconnection agreement. Embarq alone decided which terms and arrangements would be included in the template interconnection agreement and which would not. Any provisions set forth in the Embarq template interconnection were therefore the subject of the Parties' negotiations, and as such, Embarq cannot now claim that the issues raised by Intrado in its Petition with respect to those items are not subject to compulsory arbitration under Section 252.

Further, the FCC has emphasized that any "agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement" subject to Section 252.^{68/} These are just the types of obligations and services Intrado seeks to include in its proposed interconnection agreement with Embarq. Using a non-251 arrangement as Embarq suggests also would violate the Act's requirements that interconnection

^{66/} *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003) (emphasis in original).

^{67/} Embarq Motion at 8 (citing *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003)).

^{68/} *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337, ¶ 8 (2002) (emphasis in original).

agreements be filed with state commissions.^{69/} The Commission “should have the opportunity to review *all* agreements” to “best promote[] Congress’s stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms” and “to ensure that such agreements do not discriminate against third parties.”^{70/} Embarq cannot use the commercial agreement process to evade its responsibilities under the Act.

^{69/} 47 U.S.C. §§ 252(e)(1), (h).

^{70/} *Local Competition Order* ¶ 167 (emphasis in original).

CONCLUSION

For the foregoing reasons, Intrado respectfully requests that the Commission reject the Motion to Dismiss filed by Embarq. Intrado also requests that it be granted an opportunity to present oral argument on its Opposition to Embarq's Motion.

Respectfully submitted,

INTRADO COMMUNICATIONS OF VIRGINIA INC.



Craig W. Donaldson
Senior Vice President - Regulatory Affairs

Rebecca Ballesteros
Associate Counsel

Thomas Hicks
Director - Carrier Relations

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Its Attorneys

Dated: January 14, 2008

LIST OF ATTACHMENTS

NO.	BRIEF DESCRIPTION
1.	Attachment 7 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Oct. 3, 2007)
2.	Attachment 10 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Oct. 24, 2007); Email from Thomas Hicks, Intrado, to Kathryn Feeney, Embarq (Oct. 24, 2007)
3.	Attachment 11 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Nov. 1, 2007); Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Nov. 1, 2007)
4.	Email correspondence from Thomas Hicks, Intrado, to Various Intrado Personnel (Dec. 13, 2007)
5.	Email correspondence from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Dec. 14, 2007)

CERTIFICATE OF SERVICE

I, Angela F. Collins, hereby certify that a copy of Intrado Communications of Virginia Inc.'s Opposition to Motion to Dismiss and Motion for Oral Argument was served upon the parties of record this 14th day of January 2008 as indicated below.


Angela Collins

Edward Phillips
Attorney
Embarq
1411 Capital Boulevard
Wake Forest, NC 27587-5900
Via Federal Express and electronic mail (without attachments)

Kathryn L. Feeney
Manager - Contract Management
Embarq
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
Via Federal Express and electronic mail (without attachments)

William Watkins, Esq.
Attorney for Embarq
Embarq
5454 West 110th Street
Overland Park, KS 66211
Mailstop: KSOPKJ0401
Via Federal Express and electronic mail (without attachments)

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@Embarq.com]
Sent: Wednesday, October 03, 2007 3:05 PM
To: Hicks, Thomas
Subject: ICA

Tom - We are still discussing internally. Day 160 is 10/24/07. We would like to extend the window. I know we won't be ready to sign an agreement by then. Please let me know what you think about that.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Hicks, Thomas
Sent: Wednesday, October 24, 2007 8:59 AM
To: Feeney, Kathryn L [EQ]
Cc: Hicks, Thomas
Subject: RE: Intrado-Embarq Negotiations

Thank you Kathryn.

We look forward to your response, and please feel free to call me if you should need any clarification of our proposed edits.

Tom Hicks, ENP
Intrado Inc.
Director-Carrier Relations
Tel: (972) 772-5883
Mob: (972) 342-4482
Email: thomas.hicks@intrado.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@Embarq.com]
Sent: Wednesday, October 24, 2007 8:55 AM
To: Hicks, Thomas
Subject: Negotiations

Tom - I just wanted to touch base with you. We are working on a response to you, but it is taking longer than anticipated. I hope to have something for your review by early next week.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Thursday, November 01, 2007 2:38 PM
To: Hicks, Thomas
Subject: Negotiations

Tom:

Embarq's regulatory policy and legal departments have reviewed your request for interconnection under §251(c)(2) of the Act. The database network arrangements Intrado has requested are for the exchange of data or information, not for the transmission of local telephone exchange and exchange access telecommunications. As such, they are not subject to the interconnection obligations of §251(c)(2) of the Act. However, we may be able to work out an arrangement under a commercial agreement and would like to get some more details from you. We are available for a call November 13th, 14th or 15th from 4 to 5 CST. Does that time on one of those days work for you?

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Thursday, November 01, 2007 3:26 PM
To: Hicks, Thomas
Subject:

Tom - I got your vm and am trying to get some times together for a meeting tomorrow or early next week. I have been asked to clarify one point in my earlier email to you. We do believe that parts of the request fall under 251a but not 251b and 251c so arbitration doesn't apply. We take the position that a 251a agreement is a commercial agreement.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Hicks, Thomas

Sent: Thursday, December 13, 2007 11:16 AM

To: Ballesteros, Rebecca; Sorensen, Eric; 'Cindy Clugy (cclugy@comcast.net)'; Kiser, Cherie

Cc: Hicks, Thomas; Spence, Carey

Subject: Embarq 251 Negotiaions

For your records...

Please be advised that I left a callback message this morning for Kathryn Feeney (Embarq) acknowledging that we have filed for arbitration (not sure she is aware) and informing her that we would be happy to participate on any call she may wish to arrange to cooperatively work towards resolution of any of the outstanding issues identified in our filing.

I will advise once/if I hear back from her.

Tom Hicks, ENP

Intrado Inc.

Director-Carrier Relations

Tel: (972) 772-5883

Mob: (972) 342-4482

Email: thomas.hicks@intrado.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Friday, December 14, 2007 8:29 AM
To: Hicks, Thomas
Subject: Intrado Arbitrations

Tom:

I got your voice mail message asking if Embarq would be willing to negotiate some of the issues Intrado raised during negotiation to see if there are any issues we could resolve. I checked with our legal department and we are going to be busy preparing our responses to the filings and won't be available for any continued negotiations until after the first of the year, unless Intrado would be willing to withdraw its petitions and move back the filing date or agree to waive the 270 time frame in the federal act and file a joint motion holding the arbitrations in abeyance to give the parties additional time to negotiate.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

3.

Embarq Reply to Intrado Comm's Opposition to Motion
to Dismiss and Motion for Oral Argument

Voice | Data | Internet | Wireless | Entertainment



EMBARQTM

Embarq
Mailstop: NCWKF0313
14111 Capital Boulevard
Wake Forest, NC 27587-5900
embarq.com

2008 JAN 24 A 11:24

2008 JAN 24 A 11:24

January 23, 2008

Joel H. Peck, Clerk
State Corporation Commission
1300 East Main Street, First Floor
Richmond, Virginia 23218

Re: Central Telephone Company of Virginia's and United Telephone-Southeast, Inc.'s Reply to Intrado Communications of Virginia Inc.'s Opposition to Motion to Dismiss and Motion for Oral Argument

Dear Mr. Peck:

PUC 2007-00112

Enclosed for filing in the above-referenced case is the original and fifteen (15) copies of the Reply of Central Telephone Company of Virginia and United Telephone-Southeast, Inc. to Intrado Communications of Virginia, Inc.'s Opposition to Motion to Dismiss and Motion to Oral Argument.

An extra copy of this letter is enclosed for date-stamping and return in the usual manner. Finally, please do not hesitate to contact me with any questions.

Sincerely,

Edward Phillips

HEP:sm

Enclosures

cc: Parties of Record

Edward Phillips

ATTORNEY

Voice: (919) 554-7870

Fax: (919) 554-7913

edward.phillips@embarq.com

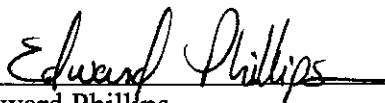
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of Central Telephone Company of Virginia's and United Telephone-Southeast, Inc.'s Reply to Intrado Communications of Virginia Inc.'s Opposition to Motion to Dismiss and Motion for Oral Argument upon all parties of record in this proceeding by depositing a copy in the United States Mail, first-class postage prepaid.

This the 23rd day of January, 2008.

Rebecca Ballesteros
Associate Counsel
Intrado Communications Inc.
1601 Dry Creek Drive
Longmont, CO 80503

Rebecca R. Geller, Esq.
Mintz Levin
701 Pennsylvania Avenue, N.W.
Washington, DC 20004



Edward Phillips

Attorney

Central Telephone Company of Virginia
United Telephone-Southeast, Inc.

Petition of Intrado Communications of Virginia,
Inc. for Arbitration Pursuant to Section 252(b) of
the Communications Act of 1934, as amended,
to Establish an Interconnection Agreement with
Central Telephone Company of Virginia and
United Telephone-Southeast, Inc. (collectively,
“Embarq”)

Central Telephone Company of Virginia and United Telephone-Southeast, Inc. (collectively, “Embarq”),¹ pursuant to 5 VAC 5-20-110 of the Virginia State Corporation Commission’s (the “Commission’s”) Rules of Practice and Procedure files its reply to the Opposition to Motion to Dismiss and Motion for Oral Argument (“Response”) filed by Intrado Communications of Virginia, Inc. (“Intrado”) with the Commission on January 14, 2008, in the above-referenced matter.²

As the Commission is aware, and as Embarq has already stated in its Motion to Dismiss, Intrado failed to properly raise in the negotiations and to bring to Embarq's attention all of the issues Intrado now desires to have resolved by this Commission through arbitration. When

¹ On November 9, 2007, United Telephone-Southeast, Inc. was converted to a limited liability company. Embarq's request for approval of the name change was filed with the Commission on December 13, 2007.

² Under Commission Rule 5 VAC 5-20-110 Embarq, as the moving party, may file a reply to Intrado's Response. Additionally, under Rule 5 VAC 5-20-110 a reply is due within ten days of the filing of a response. As noted above, Intrado filed its Response on January 14, 2008. Under Commission Rule 5 VAC 5-20-140, when the period for filing is fifteen days or less intervening weekends or holidays are not counted in determining the due date. Therefore, under the applicable Rules of Practice and Procedure Embarq can file its reply on or before January 25, 2008.

Intrado filed its Petition for Arbitration on November 27, 2007, Intrado set forth twenty-five issues that it never raised in the course of negotiations with Embarq. The purpose of this reply is to point out that Intrado's misguided action is not limited to Embarq. During the same period Intrado was "negotiating" with Embarq, Intrado was also "negotiating" with AT&T in states other than Virginia. Consistent with Intrado's approach with Embarq, Intrado also filed for arbitration with AT&T in Ohio, Florida and North Carolina without, according to AT&T, fully negotiating the issues.³ In each of those jurisdictions, AT&T states in its responsive pleadings that the parties had no meaningful negotiations and that it was caught off guard by new issues that Intrado raised with AT&T only three days before Intrado filed for arbitration. See Attachment A at pp. 3-4, Attachment B at pp. 3-4 and Attachment C at pp. 2-3.

As Embarq reads the pleadings filed by AT&T in Ohio, Florida and North Carolina, it seems all too clear that Intrado is traveling the same path with AT&T that it has with Embarq. In other words, Intrado's modus operandi is to request negotiation, wait for a period of time to arrange face-to-face meetings, and then at the eleventh hour blind-side the ILEC with new issues for the very first time – either at the time of filing of the arbitration, as is the case with Embarq, or three days prior to filing for arbitration as apparent in the AT&T cases. This practice must not be rewarded by state commissions granting Intrado's request for arbitration. Rather, as Embarq believes, the State Corporation Commission should dismiss Intrado's Petition for the reasons articulated by Embarq in its Motion to Dismiss. In addition, not only does the Commission have the ability to dismiss Intrado's Petition based on Embarq's filing herein, the Commission also

³ Intrado's Petition for Arbitration before the Public Utilities Commission of Ohio is docketed as Case No. 07-1280-TP-ARB, the Intrado proceeding before the Florida Public Service Commission is docketed as Docket No. 070736-TP and the Intrado proceeding before the North Carolina Utilities Commission is docketed as Docket No. P-1187, Sub 2. As Embarq understands, Intrado filed for arbitration in all three states on December 18, 2007. AT&T's Motion to Dismiss filed in Ohio is attached as Attachment A, AT&T's Motion to Dismiss filed in Florida is attached as Attachment B and AT&T's Motion to Hold in Abeyance filed in North Carolina is attached as Attachment C.

has the ability not to exercise its discretion under Virginia Code Ann. § 56-265.4:4.B. 4. Thus, if not dismissed, the Commission should refrain from exercising its discretion under the Virginia Code and defer the matter.

As to Intrado's request for oral argument, Footnote 49, p. 11 of Intrado's Response, clearly sets forth Intrado's understanding that the Commission will likely decline to exercise jurisdiction over Intrado's arbitration request and defer the arbitration to the Federal Communications Commission. If the Commission is unlikely to exercise jurisdiction over Intrado's arbitration request, then the Commission should not burden itself with an irrelevant oral argument. Moreover, Intrado does not deny that it raised new issues in its Petition for Arbitration and that Embarq was never asked to consider during negotiations. In light of this undeniable fact and based on the facts plead in Embarq's Motion to Dismiss; it would be a waste of the Commission's resources to hear any further argument from Intrado. Simply put, this arbitration is not ready to move forward and additional argument will not cure that defect.

Intrado's arbitration requests with Embarq and AT&T were filed to consider issues that have never been fully vetted through the negotiation process. What Intrado continues to request of this Commission, as well as other state commissions, is to move forward with arbitrations that are not ripe for commission action. Based on the facts in Embarq's Motion to Dismiss, and the facts as alleged in AT&T's pleadings, it is now clear that Intrado has simultaneously attempted negotiations for multi-state complex interconnection agreements with two ILECs. As a result, Intrado has been unable, or unwilling, to devote the resources necessary to engage in good faith negotiations with both ILECs. Neither Embarq nor the Commission should have to suffer the consequences of Intrado's ill-advised litigation tactics. As a result, the Commission should

refuse to act on Intrado's request for arbitration, both as a matter of law and as a matter of policy and the Commission should further refuse Intrado's request for oral argument.

WHEREFORE, based on the foregoing, the Commission should dismiss Intrado's petition for arbitration as set forth herein and in Embarq's Motion to Dismiss, or in the alternative the Commission should decline to exercise its discretion under Virginia Code Ann. § 56-265.4:4.B. 4, and should also decline Intrado's request for oral argument.

Respectfully submitted this 23rd day of January, 2008.

A handwritten signature in cursive script, reading "Edward Phillips", is written over a horizontal line.

Edward Phillips, Attorney
Central Telephone Company of Virginia
United Telephone-Southeast, Inc.
14111 Capital Boulevard
Mailstop: NCWKFR0313
Wake Forest, NC 27587
VA State Bar No. 73770
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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of Intrado Communications)
Inc. for Arbitration Pursuant to Section 252(b) of the)
Communications Act of 1934, as amended, to Establish) Case No. 07-1280-TP-ARB
an Interconnection Agreement with The Ohio Bell)
Telephone Company d/b/a AT&T Ohio)

**THE OHIO BELL TELEPHONE COMPANY'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE,
INTRADO COMMUNICATIONS INC.'S PETITION FOR ARBITRATION**

The Ohio Bell Telephone Company d/b/a AT&T Ohio ("AT&T Ohio"), pursuant to Ohio Admin. Code § 4901-1-12, hereby moves to dismiss the Petition for Arbitration ("Petition") of Intrado Communications, Inc. ("Intrado"). In the alternative, AT&T respectfully requests that the Commission hold the Petition in abeyance so that the parties can negotiate the issues identified in the Petition. The Commission should also hold the Petition in abeyance until it rules on Intrado's Application to provide CLEC Services in Case No. 07-1199-TP-ACE.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The parties have not negotiated the issues Intrado has petitioned the Commission to arbitrate. Intrado admits that it first presented to AT&T the contract language it now seeks to arbitrate on December 18, 2007 – only three days before it filed the Petition. Pet. at 15. It is no wonder then that, as Intrado acknowledges, "[t]he Parties have been unable to reach agreement on any issue" (Pet. at 9), or that for each of the 36 alleged "unresolved" issues identified in the Petition, Intrado states that AT&T Ohio's position is "unclear" or "unknown."

This Commission knows from its extensive experience arbitrating interconnection agreements that the conduct of a multi-issue arbitration is arduous for all involved, including Commission Staff, even when the parties have negotiated extensively and understand each

other's positions. The process would be downright unmanageable if the Commission were to try to arbitrate dozens of issues that the parties have not discussed at all, and with respect to which it is not even clear whether the parties actually disagree or, if they do, to what extent. Fortunately, the Telecommunications Act of 1996 ("1996 Act" or "Act") does not require, or arguably even allow, the Commission to waste its resources on such an exercise, because it contemplates that the Commission will arbitrate only "open issues" arising from negotiations – not a laundry list of what may or may not be issues presented by a Petitioner who has not negotiated them with the Respondent. Accordingly, the Commission should dismiss the Petition.

In the alternative, if the Commission prefers to keep the proceeding open, it should hold the proceeding in abeyance so that the parties can negotiate an interconnection agreement in accordance with the 1996 Act and the Commission's Carrier-to-Carrier rules. Then, to the extent that open issues emerge from the negotiations, the parties can identify them and proceed with the arbitration.

There is an additional reason to hold this case in abeyance. In Case No. 07-1199-TP-ACE, the Commission has under consideration Intrado's Application for certification to provide competitive local exchange carrier ("CLEC") services in Ohio. If the Commission denies Intrado's Application, which has been opposed, Intrado will not be entitled to an interconnection agreement with AT&T Ohio, and the Petition will be moot.

II. ARGUMENT

A. The Petition Should Be Dismissed Because The Parties Did Not Negotiate The "Unresolved Issues."

Under the 1996 Act, an incumbent local exchange carrier ("ILEC"), such as AT&T Ohio, has the duty to negotiate and enter into binding interconnection agreements with requesting telecommunications carriers. *See* 47 U.S.C. §§ 251(c)(1) and 252(a). The requesting carrier has

the same duty to negotiate in good faith. *Id.* § 251(c)(1). The Commission's Carrier-to-Carrier rules impose similar duties. *See, e.g.,* Ohio Admin. Code § 4901:1-7-08. The 1996 Act allots a substantial period – 135 days to 160 days – for negotiation. 47 U.S.C. § 252(b)(1). Only then, to the extent such negotiations are unsuccessful, may either party to the negotiations “petition [the] State commission to arbitrate any open issues.” *Id.* Notably, even though the 1996 Act is replete with deadlines designed to minimize delay in getting an effective interconnection into place,¹ neither party is permitted to petition for arbitration before day 135. Plainly, Congress contemplated substantial negotiation; of the nine months starting with the request for negotiation and ending with the arbitration award, a minimum of half that time is allocated to the negotiations. *See Verizon North v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) (recognizing that “private negotiation . . . is the centerpiece of the Act”).

The Petition makes plain that there were no meaningful negotiations of the issues presented in the Petition. Intrado requested negotiation on May 18, 2007. *Pet.* at 12. Following additional communications, AT&T provided Intrado, on August 2, 2007, with the AT&T 13-State template interconnection agreement (“AT&T 13-State Agreement”), which contains AT&T's baseline interconnection terms and conditions for Ohio. *Id.* at 13. However, Intrado did not provide AT&T with its proposed changes to the language in the AT&T 13-State Agreement (which changes embody Intrado's positions on the 36 issues that it now wants the Commission to arbitrate) until December 18, 2007 – more than four months after AT&T

¹ *E.g.,* 47 U.S.C. § 252(b)(3) (25 days for Response to Petition); § 252(b)(4)(C) (nine months from request to negotiate for completion of arbitration); § 252(e)(4) (30 days for approval of arbitrated agreement and 90 days for negotiated agreement).

provided the 13-State Agreement to Intrado.² *Id.* at 15. Then, on December 21, 2007, only three days later, Intrado filed the Petition for Arbitration.

AT&T had virtually no opportunity to respond to – much less to negotiate – Intrado’s positions regarding the AT&T 13-State Agreement. That is why the Petition states that “[t]he Parties have been unable to reach agreement on any issue,” and why Intrado has no idea of AT&T Ohio’s positions on any of the 36 “unresolved” issues.³ *Indeed, for all Intrado knows, AT&T may be willing to accommodate many of Intrado’s concerns.* The way to find out is to negotiate. But instead, Intrado asks the Commission to waste its resources by arbitrating *every* matter Intrado wants to raise, before the parties have even discussed them. The Commission should deny Intrado’s request, dismiss the Petition, and require Intrado – in accordance with the 1996 Act and the Commission’s rules – to engage in negotiations with AT&T Ohio and then pursue arbitration only those open issues on which the parties cannot agree.

Intrado points the finger at AT&T, which it alleges was unwilling to negotiate in good faith. Pet. at 16. Nonsense. In the first place, AT&T Ohio had no opportunity to negotiate the AT&T 13-State Agreement at all. But even more important, if Intrado thought AT&T was failing to negotiate in good faith, the solution was to force AT&T’s hand by seeking the Commission’s assistance *during the negotiation period*, not to let that period lapse and then ask

² The Petition asserts that Intrado “provided [to AT&T] a mark up of three portions of the AT&T 9-State Agreement on October 11, 2007” and that AT&T rejected Intrado’s proposals. Pet. at 15-16. What AT&T and Intrado did or did not do with respect to the AT&T 9-State Agreement is irrelevant here, because the AT&T 9-State Agreement does not apply to Ohio; it applies only to the legacy BellSouth states. In addition, Intrado admits that it determined that the AT&T 13-State Agreement “would be a more workable agreement for the interconnection sought by Intrado than the AT&T 9-State Agreement.” *Id.* at 15.

³ The Commission’s Carrier-to-Carrier rules with respect to arbitration of interconnection agreements provide that “[t]he Commission will only arbitrate issues that have been unresolved between the parties and filed with the Commission in the petition for arbitration . . .” Ohio Admin. Code § 4901:1-7-09(B). “Unresolved,” of course, means unresolved after negotiation.

the Commission to arbitrate all the issues (and, in all likelihood, non-issues) that Intrado wants to address.

Section 252(a)(2) of the 1996 Act provides, "Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation." 47 U.S.C.

§ 252(a)(2). In keeping with the federal statute, Ohio Admin. Code 4901:1-7-08(B)(1) provides:

Mediation is a voluntary alternative dispute resolution process in which a neutral third party assists the parties in reaching their own settlement. *At any point during the negotiation*, any party or both parties to the negotiation may ask the commission to mediate *any differences arising during the course of the negotiation*. (Emphasis added.)

A request for mediation is the appropriate course for a carrier that finds itself in the position Intrado claims it was in. See *Atl. Alliance Telecom., Inc. v. Bell Atl.*, No. 99 CV 4915 (ARR), 2000 U.S. Dist. LEXIS 19649, **13-14 (E.D.N.Y. Apr. 17, 2000) ("The provision for mediation by the state commission lends itself to resolution of complaints [for failure to negotiate in good faith] such as plaintiff's. Under § 252(a), plaintiff could have asked the state commission to participate in the negotiations at any time after the initial request, thereby forcing defendant to the table.").

The simple bottom line is that the parties did not meaningfully negotiate the issues on which Intrado has petitioned for arbitration. The Commission need not decide whose fault that was. Intrado would say it was AT&T's fault. AT&T vehemently disagrees, but it makes no difference, because even if Intrado were correct, it bypassed the obvious remedy – mediation – and instead seeks to arbitrate everything in the 13-State Agreement that Intrado does not like, before discussing the matter with AT&T. For present purposes, all that really matters is that these parties are not ready to arbitrate, and the Commission should not be, and need not be, stuck

with the consequences. The Petition for Arbitration should be dismissed, and can be re-filed, to the extent necessary, after the parties have negotiated.

B. If The Commission Does Not Dismiss The Petition, It Should Hold It In Abeyance So That The Parties May Negotiate The Issues As Required By Law.

If the Commission prefers not to close this docket, it should at least hold the Petition in abeyance so that the parties can negotiate. If the parties are unable to reach complete agreement on all issues after such negotiations, the parties could then identify the remaining open issues – in the sense intended by the words “open issues” in the 1996 Act – for arbitration.

The Commission should also – unless it dismisses the Petition – hold the Petition in abeyance pending its decision in Case No. 07-1199-TP-ACE, which concerns Intrado's Application for certification to provide CLEC services in Ohio. Several parties (including AT&T) have objected to Intrado's Application and have intervened in that proceeding.⁴ The objecting parties have raised the issue of whether Intrado can qualify as a “local exchange carrier” under the Commission's rules given Intrado's stated intention to provide only specialized basic exchange services to Public Safety Answering Points (“PSAPs”).⁵ The Commission will have to determine this threshold issue in deciding whether to grant Intrado's Application. If the Commission determines that Intrado does not qualify as a local exchange carrier, and denies its Application for CLEC certification, Intrado will not be entitled to an interconnection agreement with AT&T,⁶ and the Petition will be moot. Therefore, in addition to

⁴ On December 18, 2007, the Commission granted the objecting parties' requests for intervention and suspended Intrado's Application for certification pending Staff investigation.

⁵ Under the Commission's rules, a “local exchange carrier” is defined as “any facilities-based and nonfacilities-based ILEC and CLEC that provides basic local exchange services to consumers on a common carrier basis.” Ohio Admin. Code § 4901:1-6-01(K).

⁶ The Commissions Carrier-to-Carrier Rules with respect to negotiation and arbitration of interconnection agreements apply only to telephone companies. See Ohio Admin. Code §§ 4901:1-7-06 through 4901:1-7-09.

the reasons stated above, the Commission should hold the Petition in abeyance pending its decision on Intrado's Application.

III. CONCLUSION

For the reasons set forth above, AT&T Ohio respectfully requests that the Commission dismiss Intrado's Petition for Arbitration, or in the alternative, hold the Petition in abeyance to allow the parties to negotiate the issues as required by law, and pending the Commission's decision in Case No. 07-1199-TP-ACE.

Respectfully submitted,


Mary Ryan Fenton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on January 14, 2008 by first class mail, postage prepaid, and by e-mail, as indicated, on the following parties:

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Mary Ryan Fenlon

Attachment B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Intrado Communications)
Inc. for Arbitration Pursuant to Section 252(b) of the)
Communications Act of 1934, as amended, to Establish) Docket No. 070736-TP
an Interconnection Agreement with BellSouth)
Telecommunications, Inc. d/b/a AT&T Florida)

AT&T FLORIDA'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE, INTRADO COMMUNICATIONS INC.'S PETITION FOR ARBITRATION

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") hereby moves to dismiss the Petition for Arbitration ("Petition") of Intrado Communications, Inc. ("Intrado"). In the alternative, AT&T Florida respectfully requests that the Florida Public Service Commission ("Commission") hold the Petition in abeyance so that the parties can negotiate the issues identified in the Petition.

I. INTRODUCTION

1. The parties have not negotiated the issues Intrado has petitioned the Commission to arbitrate. Intrado admits that it first presented to AT&T the contract language it now seeks to arbitrate on December 18, 2007, only three days before it filed the Petition. (Pet. at 15). It is no wonder then that, as Intrado acknowledges, "[t]he Parties have been unable to reach agreement on any issue" (Pet. at 9), or that for each of the 36 alleged "unresolved" issues identified in the Petition, Intrado states that AT&T Florida's position is "unclear" or "unknown."

2. As the Commission is well aware, conducting a multi-issue arbitration is arduous for all involved, even when the parties have negotiated extensively and understand each other's positions. This process would become unmanageable if the Commission were to try to arbitrate dozens of issues that the parties have not negotiated, especially considering that it is currently not even clear whether the parties actually disagree or, if they do, to what extent. Fortunately, the

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Telecommunications Act of 1996 ("1996 Act" or "Act") does not require the Commission to waste its resources on such an exercise. Instead, the Act contemplates that the Commission will arbitrate only "open issues" arising from negotiations, not a laundry list of potential issues presented by a Petitioner who has not negotiated them with the Respondent. Accordingly, the Commission should dismiss the Petition.

3. In the alternative, if the Commission prefers to keep the proceeding open, it should hold the proceeding in abeyance so that the parties can negotiate an interconnection agreement in accordance with the 1996 Act. To the extent that open issues emerge from the negotiations, the parties jointly can identify them and proceed with the arbitration.

II. DISCUSSION

4. Under the 1996 Act, an incumbent local exchange carrier ("ILEC"), such as AT&T Florida, has the duty to negotiate and enter into binding interconnection agreements with requesting telecommunications carriers. *See* 47 U.S.C. §§ 251(c)(1) and 252(a). The requesting carrier has the same duty to negotiate in good faith. *Id.* § 251(c)(1). The 1996 Act allots a substantial time period (135 days to 160 days) for negotiation. 47 U.S.C. § 252(b)(1). Only after negotiations occur may either party "petition [the] State commission to arbitrate any open issues." *Id.* Notably, even though the 1996 Act is replete with deadlines designed to minimize delay in getting an effective interconnection into place,¹ neither party is permitted to petition for arbitration before day 135. Obviously, Congress contemplated that substantial negotiations would occur prior to the filing of a Petition for Arbitration.²

¹ *E.g.*, 47 U.S.C. § 252(b)(3) (25 days for Response to Petition); § 252(b)(4)(C) (nine months from request to negotiate for completion of arbitration); § 252(e)(4) (30 days for approval of arbitrated agreement and 90 days for negotiated agreement).

² *See Verizon North v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) (recognizing that "private negotiation . . . is the centerpiece of the Act").

5. The chronology recited in the Petition makes clear that no meaningful negotiations have occurred in the instant case.³ Intrado requested negotiation on May 18, 2007. (Pet. at 12). Following additional communications, AT&T provided Intrado with the AT&T 9-State template interconnection agreement ("AT&T 9-State Agreement") on August 30, 2007. This template agreement contains AT&T's Florida's baseline interconnection terms and conditions for Florida. (*Id.* at 13). Intrado responded to this template by providing, on October 11, 2007, changes to certain portions of this agreement. However, Intrado also sent to AT&T on December 18, 2007 a marked up version of AT&T's 13-state template interconnection agreement ("AT&T 13-State Agreement"), which is currently the template for use in AT&T State's outside of the Southeast region.⁴ Thus, Intrado provided to AT&T the changes that reflect the positions it takes in this arbitration only three days before filing the Petition for Arbitration on December 21, 2007, using an agreement that is not currently available for use in the Southeast region.

6. AT&T Florida has had virtually no opportunity to respond to Intrado's positions as set forth in its changes to the AT&T 13-State Agreement. Moreover, by providing its changes in a format not used in the Southeast region (and which AT&T Florida has no obligation to negotiate from), Intrado has complicated the process even more. For these reasons, as the Petition states, "[t]he Parties have been unable to reach agreement on any issue," and Intrado has no idea of AT&T Florida's positions on any of the 36 "unresolved" issues. For all Intrado knows, AT&T Florida may be willing to accommodate many of its requests. The way to find out

³ Although AT&T Florida may not agree with all aspects of Intrado's recitation of this chronology in its Petition, the Petition does accurately reflect the fact that there was a great deal of activity, and contact between the parties, prior to the Petition being filed. However, rather than reiterating this activity, AT&T Florida focuses herein on the specific facts most directly related to the current situation.

⁴ The distinction between the 9-state and 13-state Interconnection Agreements is important because, prior to December 29, 2006, AT&T and BellSouth were different companies with different products provided by way of different networks. These differences resulted in material differences in the template Interconnection Agreements offered by the two companies. Some of those differences survive in the current 9 State and 13 State Agreements.

is for the parties to negotiate. Instead, Intrado asks the Commission to waste its resources by arbitrating *every* matter Intrado raises, and to do so before the parties have even discussed them.

7. Intrado alleges that AT&T was unwilling to negotiate in good faith (Pet. at 16). AT&T Florida denies this claim. Moreover, if Intrado thought AT&T had failed to negotiate in good faith, the proper solution was to request the Commission's assistance *during the negotiation period*, not to let that period lapse and then ask the Commission to arbitrate all the issues (and, in all likelihood, non-issues) that Intrado has raised.

Section 252(a)(2) of the 1996 Act provides, "Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation." 47 U.S.C. § 252(a)(2).

A request for mediation is the appropriate course for a carrier that finds itself in the position Intrado claims it was in.⁵

8. The undeniable fact is that the parties have not meaningfully negotiated the issues on which Intrado has petitioned for arbitration. Although the parties obviously disagree as to who is responsible for the current situation, it really does not matter. For present purposes, all that really matters is that these parties are not ready to arbitrate, and the Commission should not be placed in the position of having to deal with the consequences of this fact. The Petition for Arbitration should be dismissed, and the Commission should require Intrado to comply with the 1996 Act by engaging in negotiations with AT&T Florida. After these negotiations, Intrado would then be free to pursue arbitration on any issues that remain unresolved and appropriate for arbitration.

⁵ See *Atl. Alliance Telecom., Inc. v. Bell Atl.*, No. 99 CV 4915 (ARR), 2000 U.S. Dist. LEXIS 19649, **13-14 (E.D.N.Y. Apr. 17, 2000) ("The provision for mediation by the state commission lends itself to resolution of complaints [for failure to negotiate in good faith] such as plaintiff's. Under § 252(a), plaintiff could have asked the state commission to participate in the negotiations at any time after the initial request, thereby forcing defendant to the table.").

9. If the Commission prefers not to close this docket, it should at least hold the Petition in abeyance so that the parties can negotiate. If the parties are unable to reach complete agreement on all issues after these negotiations, the parties would at least then be able to identify the remaining open issues for arbitration.⁶ In this regard, AT&T Florida suggests that the Commission hold the proceeding in abeyance for a set period of time, but not less than 60 days, to allow negotiation.⁷ Further, the parties should be directed to use their best efforts to develop, to the extent necessary, a joint list of issues that remain unresolved at the conclusion of this period.

III. CONCLUSION

10. For the reasons set forth above, AT&T Florida respectfully requests that the Commission dismiss Intrado's Petition for Arbitration, or in the alternative, hold the Petition in abeyance to allow the parties time to negotiate the issues as required by law.

⁶ Moreover, as noted in AT&T Florida's Response and the Issue Matrix thereto, AT&T Florida believes that at least some of the issues raised by Intrado are not the proper subject of an arbitration pursuant to § 252 of the Act. An additional period in which the parties will negotiate would allow AT&T to determine whether there are any such issues, and to refine its responses accordingly.

⁷ If the negotiation starts from the AT&T 9 State redline, 60 days could well be enough time to allow the parties to reach all possible agreements. If the negotiation starts from the AT&T 13 State Agreement, much more time will be necessary to conform the agreement to the pricing and processes that exist in Florida to accommodate technical and OSS limitations as well as different pricing structures.